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**IN THE
COURT OF APPEALS OF INDIANA**

EUGENIA CROWE-PHILLIPS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0603-CR-266

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0411-FC-202325

January 12, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Eugenia Crowe-Phillips appeals the trial court's finding that she violated the terms of the community corrections program and its order that she serve the remainder of her four-year executed sentence at the Department of Correction.

We affirm.

ISSUES

1. Whether the trial court's order must be reversed because Crowe-Phillips' due process rights were violated.
2. Whether the trial court's order must be reversed because the trial court failed to consider mitigating factors.

FACTS

On November 15, 2004, the State charged Crowe-Phillips with eight counts: four counts of forgery, as class C felonies; and one each of the following class D felony offenses -- theft, identity deception, fraud, and auto theft. On March 9, 2005, Crowe-Phillips and the State filed with the trial court their signed plea agreement whereby Crowe-Phillips agreed to plead guilty to the first count of forgery and the State would forgo prosecution on the remaining seven counts; and with the State making no sentencing recommendation "except a cap of 4 years on any executed portion of the sentence." (App. 53). On March 30, 2005, the trial court held a hearing at which Crowe-Phillips was advised of the rights she waived by pleading guilty; the trial court found a factual basis existed for the plea; and it accepted Crowe-Phillips' plea of guilty to having committed forgery when, "with intent to defraud," she "ma[d]e" a deposit slip to withdraw funds from the account of Wilma Strouse. (App. 22). After considering the

pre-sentence investigation report, the trial court sentenced Crowe-Phillips to serve four years executed, with placement in the community corrections program at a facility deemed appropriate by that program.

On September 20, 2005, Crowe-Phillips was placed in a residential facility. On September 26, 2005, the State filed with the trial court a notice alleging that Crowe-Phillips had “violated the conditions of placement” at the community corrections program. (App. 91). Specifically, it was alleged that “on 9/23/2005, [Crowe-Phillips] left the residential facility, on an approved job search pass, . . . was due to return at 4:00 p.m.,” but had “failed to do so” and never returned. *Id.* A warrant was issued for Crowe-Phillips’ arrest. On February 9, 2006, she was arrested.

On February 10, 2006, the trial court held Crowe-Phillips’ initial hearing on the violation allegation. The trial court read to her the above allegation. It then, at her request, assigned counsel to represent Crowe-Phillips at the March 3rd hearing on the alleged violation.

On March 3, 2006, the trial court held the violation hearing. Again, it read to her the allegation made in the notice of violation. The trial court asked Crowe-Phillips’ counsel for her “client’s position.” (Tr. 8). Counsel responded that “Crowe-Phillips ha[d] some explanation for what was going on and why she left the facility and she’d like to explain that to you.” *Id.* Crowe-Phillips was sworn to tell the truth, and she admitted that she had left the residential facility, “kn[e]w [she] should have went [sic] back, but . . . didn’t go back.” (Tr. 11). She further testified that “after [she] didn’t go back,” she “was scared” about having violated the rules and “stayed away” until she “got stopped by

the police” on February 9, 2006. (Tr. 12). The trial court found that Crowe-Phillips had violated the rules of her community corrections placement and ordered that she serve the remainder of her four-year executed sentence at the Department of Correction.

DECISION

1. Due Process

Crowe-Phillips argues that the trial court violated her due process rights when (1) it did not advise her of her due process rights before proceeding with the violation hearing, and (2) she was not provided written notice of the nature of her violation of the community correction program rules. We cannot agree.

The due process required for the revocation of a defendant’s placement in a community corrections program has been articulated by the Indiana Supreme Court as follows:

. . . a defendant in a community corrections program is entitled to representation by counsel, written notice of the claimed violations, disclosure of the opposing evidence, an opportunity to be heard and present evidence, and the right to confront and cross-examine witnesses in a neutral hearing before the trial court.

Cox v. State, 706 N.E.2d 547, 550 (Ind. 1999). However, a probation or community corrections placement revocation hearing is not to be equated with an adversarial criminal proceeding. Rather, it is a narrow inquiry, and its procedures are to be more flexible. *Id.* This is necessary to permit the court to exercise its inherent power to enforce obedience to its lawful orders. *Id.*

Crowe-Phillips first argues that her due process rights were violated when the trial court failed to provide her “with an advisement of rights prior to her testimony” at the

violation hearing. Crowe-Phillips' Br. at 6. As authority for the premise that she was entitled to be advised of her right not to testify, she cites *Martin v. State*, 813 N.E.2d 388, 390 (Ind. Ct. App. 2004). Martin's testimony took place at the initial hearing after the State filed a notice of probation violation. Martin was without counsel at that hearing, and our narration of the facts states that the trial court advised Martin "of his right to a contested hearing, his right to confront and cross-examine witnesses, his right not to testify, and his right to an attorney." *Id.* Martin arguably indicated to the trial court that he would proceed without counsel. However, we found that Martin's rather confusing subsequent sworn testimony was insufficient to establish that he had violated probation. *Id.* at 391.

Martin does not compel a reversal of the trial court's order that Crowe-Phillips serve the remainder of her executed sentence at the Department of Correction. Crowe-Phillips asked to testify and sought to present her reasons for not returning to the residential in the light most favorable to herself. Also, unlike Martin, Crowe-Phillips was represented by counsel, and we presume counsel advised her of her rights with respect to testifying. Further, *Martin* did not specifically hold that the advisements made by the trial court in that case are constitutionally mandated at a hearing on the revocation of probation. Also, as the State observes, the constitutional privilege against self-incrimination arises when the defendant is questioned concerning matters that might incriminate her in future criminal proceedings. *See State v. Cass*, 635 N.E.2d 225, 226-28 (Ind. Ct. App. 1994) (citing *Allen v. Illinois*, 478 U.S. 364, 368 (1986)). It is not apparent, and Crowe-Phillips does not argue, that she was subject to future criminal

prosecution for having left the community corrections program's residential facility. The trial court's questions of Crowe-Phillips concerned whether she had left the facility and not returned. Such questions and the answers thereto rest within the trial court's power to enforce its placement order. *Cox*, 706 N.E.2d at 550.

Crowe-Phillips also argues that her due process rights were violated because the record fails to evidence that she received a written notice specifying her violation of the community correction rules. As quoted above, *Cox* states that "written notice of the claimed violation" is required by due process before the defendant's placement in a community corrections program may be revoked. 706 N.E.2d at 549. However, as the State notes, Crowe-Phillips did not inform or argue to the trial court that she had not received a written notice of the claimed violation. The fact that Crowe-Phillips did not raise this matter with the trial court supports a finding that this issue cannot be pressed on appeal. *See Corbin v. State*, 840 N.E.2d 424, 431 (Ind. Ct. App. 2006) (waiver of appellate claim that restraints during trial deprived defendant of his presumption of innocence where such claim never raised at trial).

Further, a federal constitutional error is harmless if it is clear beyond a reasonable doubt that it did not affect the judgment. *Pope v. State*, 853 N.E.2d 970, 972 (Ind. Ct. App. 2006). The record establishes that at both the initial hearing and the violation hearing, the trial court read to Crowe-Phillips the allegation that she had violated the community corrections program rules by leaving the residential facility on September 23, 2005, and not returning. Thus, even if Crowe-Phillips was not provided written notice of this alleged violation, it was harmless error because she was provided verbal notice

thereof, without objection, on two occasions by the trial court. Further, the evidence at the hearing established by a preponderance of the evidence that she had violated the rules of the community corrections program. *See Decker v. State*, 704 N.E.2d 1101, 1104 (Ind. Ct. App. 1999) (preponderance of the evidence standard for revocation of community corrections placement).

2. Mitigating Circumstances

Next, Crowe-Phillips argues that the revocation of her placement at the community corrections program must be reversed because the trial court failed to consider her “mental state at the time of her leaving” the residential facility. Crowe-Phillips’ Br. at 10. We disagree.

A defendant is not entitled to serve a sentence in a community corrections program; such placement is a matter of grace and a conditional liberty that is a favor, not a right. *Cox*, 706 N.E.2d at 549. Indiana statute provides that the trial court may place an offender “in a community corrections program as an alternative to the [D]epartment of [C]orrection.” Ind. Code § 35-38-2.6-3. If the offender violates the terms of the placement, the trial court “may, after a hearing, . . . revoke the placement and commit the person to the [D]epartment of [C]orrection for the remainder of the person’s sentence.” I.C. § 35-28-2.6-5. Upon finding that an offender has violated the terms of placement, whether to revoke that placement and order the offender to serve the remainder of her sentence at the Department of Correction is a decision within the trial court’s discretion. *See e.g., Sanders v. Sate*, 825 N.E.2d 952, 956 (Ind. Ct. App. 2005).

To support her argument that the trial court was required to consider her mental state, Crowe-Phillips cites to a single authority *Patterson v. State*, 659 N.E.2d 220 (Ind. Ct. App. 1995). Specifically, she cites *Patterson*'s statement as follows:

The probationer's mental state at the time and under the circumstances of the alleged violation is a factor to be considered [when making a disposition determination in a probation revocation proceeding]. We therefore hold that, at a minimum, a probationer's mental state must be considered in the dispositional determination of a probation revocation proceeding.

Id. at 222-23. In *Patterson*, at the probation violation fact-finding hearing, Patterson "testified that at the time he committed the theft, he did not possess the ability to differentiate between those actions which were right and wrong." *Id.* at 221. Patterson argued on appeal that he had presented "'uncontroverted' evidence proving that he was mentally ill at the time he committed the underlying theft upon which the revocation was based." *Id.* at 222. This evidence, according to *Patterson*, indicated that for approximately one year prior to the purse-snatching which gave rise to the theft charge, Patterson had been "under the care of a psychiatrist, Dr. Silsby." *Id.*

Thus, Patterson argued at the revocation hearing that his mental state should be taken into consideration. Crowe-Phillips made no such argument to the trial court at her violation hearing. Moreover, Crowe-Phillips' explanation for having left the facility and not returning did not include any testimony about it being related to her experiencing mental difficulties. Therefore, we do not find that *Patterson* compels that we reverse the trial court's revocation of her placement in the community corrections program and its

order that she serve the remainder of her executed sentence at the Department of Correction.

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.